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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOSEPH GABRIEL LOPEZ, Appellant.	2 CA-CR 2008-0311 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20073101

Honorable Edgar B. Acuña, Judge

AFFIRMED IN PART; MODIFIED IN PART;
VACATED IN PART; REMANDED

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E C K E R S T R O M, Presiding Judge.

¶1 Appellant Joseph Lopez was charged with first-degree burglary, a class two felony, theft by control, a class three felony, and three counts of possession of a deadly weapon by a prohibited possessor, class four felonies. Before trial, the court granted Lopez's motion to sever the burglary and theft counts from the prohibited possessor counts. A jury found Lopez guilty of first-degree burglary and theft by control, and the court granted the state's motion to dismiss the prohibited possessor counts at the conclusion of the trial. After finding that Lopez had two prior felony convictions, the trial court sentenced him to concurrent, partially aggravated terms of imprisonment, the longer of which was twenty years, to be served concurrently with the sentences in another matter. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967); *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969); and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating she has thoroughly reviewed the record and has found no arguable issues to raise on appeal. She asks us to search the record for error. Lopez has not filed a supplemental brief.

¶2 Viewing the evidence in the light most favorable to sustaining the verdicts, we find there was sufficient evidence to support the jury's findings of guilt. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). However, in reviewing the record for reversible error pursuant to *Anders*, we discovered that count two of the indictment charged Lopez with theft by control and/or controlling stolen property "with a value of $3,000 or more, but less than $25,000," which it designated a class three felony. Consistent with the indictment, the verdict form for that count included a special interrogatory asking

the jury to determine the value of the property Lopez had stolen. The jury marked the space on the interrogatory indicating it had found the value of the property to be "[a]t least $3,000.00 but less than $25,000.00." When Lopez committed the offense on August 2, 2007, A.R.S. § 13-1802(E) provided that "[t]heft of property or services with a value of four thousand dollars or more but less than twenty-five thousand dollars is a class 3 felony." *See* 2006 Ariz. Sess. Laws, ch. 195, § 2.[1] Theft of property with a value of at least $3,000 but less than $4,000 was a class four felony. *See* 2006 Ariz. Sess. Laws, ch. 195, § 2. We directed the state to file a brief addressing whether this error was fundamental and the appropriate remedy for any such error.

¶3 As the state correctly points out, because Lopez did not object to the indictment or the form of verdict, he has waived the right to relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶4 The state appears to concede, and we find, the error here was fundamental. The value range of stolen property is an element of theft that must be found by a jury beyond a reasonable doubt because the property's value determines the classification of the offense, and the classification of the offense determines the sentencing range to which the defendant is exposed. *See State v. Rushing*, 156 Ariz. 1, 4-5, 749 P.2d 910, 913-14 (1988) (reducing classification of theft conviction based on value of item stolen and remanding for

[1]The statute was amended in 2009 and subsection E became subsection G. *See* 2009 Ariz. Sess. Laws, ch. 119, § 2.

resentencing). Lopez was sentenced for a class three felony without the jury having made a necessary finding for that classification of the offense. *See State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002) ("Imposition of an illegal sentence constitutes fundamental error."); *cf. Blakely v. Washington*, 542 U.S. 296, 303 (2004) (maximum statutory sentence that which "judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*"); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

¶5 The state contends, however, the error was not prejudicial because the evidence was such that no reasonable juror could have concluded the value of the property stolen was less than $4,000. The state relies on the testimony of one of the victims, who stated a laptop computer, digital camera, flash drive, watch, and clothing had been stolen from him, the value of which was "[j]ust under $5,000." That victim also stated the computer alone was valued at "[a]round $2,000." The state also relies on the testimony of another victim and his father that guns and other property stolen from the victim had a value of $3,200. The state contends the evidence regarding value was "basically unchallenged," and "no reasonable juror could have failed to find that the stolen property had a value 'just under' $8,200." Consequently, the state insists, no remedy is necessary.

¶6 We disagree. Whether fundamental error is prejudicial "involves a fact-intensive inquiry . . . ." *Henderson*, 210 Ariz. 561, ¶ 26, 115 P.3d at 608. Here, the trial court found Lopez had committed a class three felony based on a jury finding that was legally insufficient. And, as discussed below, we disagree with the state's suggestion that no reasonable jurors could have found the value of the property at the time of the theft was less than $4,000, rendering any error harmless. We therefore conclude Lopez was prejudiced by the fundamental error.

¶7 For purposes of § 13-1802, the evidence must establish the relevant fair market value of the property at the time of the offense. *State v. Wolter*, 197 Ariz. 190, ¶ 1, 3 P.3d 1110, 1111 (App. 2000); *State v. Blankinship*, 127 Ariz. 507, 511, 622 P.2d 66, 70 (App. 1980). Contrary to the state's assertion, defense counsel did attempt to challenge the evidence regarding the value of some of the property belonging to one victim. Defense counsel asked the victim how he had arrived at a value of $2,000 for the laptop, and the victim testified he had "look[ed] on line," presumably referring to the internet, explaining, "you can find a similar model for the same price [for] $1500 to $2,000." Lopez's counsel then confirmed, "[a]nd that would be for a new Hewlett Packard, same kind of model . . . [and] [y]ours was fairly new." The victim responded that that was "[c]orrect," adding, "[i]t was my graduation [gift] from high school so it was three years old, so it would have been a replacement value of a newer model of that." Counsel elicited further testimony from the

victim, confirming that the value the victim had given was for a new model. The victim then admitted, "I wouldn't know how much a used machine would be . . . ."

¶8 The victim who owned the guns testified his father had given them to him. He stated the other items taken from him included "bags that I had from the football team," several electronic devices, "a 32-count of $1 bills that you get from the factory where they print the money," which had been a gift to him, and a safe that contained "a couple hundred [in] cash . . . [and] golden $1 coins that just got released in April 2007." The victim's father testified about the value of his son's property. When asked what he had paid for the guns, the victim's father testified he had purchased them in 1996 and 1997 "and at the time the approximate value of the guns was $1500." Subsequently, the victim's father testified the total loss for all of his son's belongings was $3,200, which included $816 it had cost to change the locks and keys to the victim's truck, in light of the fact that an extra set of keys had been taken. The state did not elicit any testimony about the present value of the guns and whether they, or any other property included in the items stolen, had depreciated in value over time. Defense counsel did not cross-examine the victim's father.

¶9 In short, nearly all of the evidence presented regarding the value of the items stolen was based on the purchase price of those items several years in the past. And, the state presented no evidence whatsoever estimating the current depreciated value of those items. Thus, the evidence relating to the value of the items at the time of the theft was, at the very least, unclear. Contrary to the state's assertion, if the jury had known the state was required

to establish the value of stolen property was $4,000, rather than $3,000, it might not have found the state had sustained its burden. *See State v. Nash*, 143 Ariz. 392, 403, 694 P.2d 222, 233 (1985) (state must prove value of stolen property). We cannot say, on this record, that it would have. We must therefore modify Lopez's conviction on count two, reduce the class of felony to a class four, vacate the sentence on that count, and remand this matter to the trial court for resentencing on count two. In all other respects, having found no other error that is both fundamental and prejudicial, we affirm.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge